

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

IN RE: DEPARTMENT OF HEALTH AND : Representation Petition
SOCIAL SERVICES, STOCKLEY CENTER : No. 95-06-145
HABILITATION SUPERVISORS :

BACKGROUND

The American Federation of State, County and Municipal Employees, AFL-CIO, District Council 81, Local 3514 ("AFSCME" or "Union") is an employee organization within the meaning of §1302(h) of the Public Employment Relations Act ("Act" or "PERA"), 19 Del.C. Chapter 13 (1994). The State of Delaware, Department of Health and Social Services ("State" or "Employer") is a public employer within the meaning of §1302(m), of the PERA.

The Stockley Center ("Center") is a residential facility owned and operated by the State for the purpose of providing care for mentally disabled persons.

AFSCME filed a Representation Petition on or about June 29, 1995, requesting to modify an existing bargaining unit of Stockley employees comprised exclusively of Nurse I, II and III, Nurse Supervisors, CMRP Nurse and CMRP Nurse Supervisor to include the currently unrepresented employees in the classification of Habilitation Supervisor at the Stockley Center.

The State opposes the Petition for the reasons that: (1) Habilitation Supervisors are supervisory employees and, therefore, excluded from coverage under the Act; and (2) if not supervisors, are inappropriate for inclusion in a bargaining unit comprised exclusively of Registered Nurses and Nurse Supervisors.

Alternatively, the State argues that if it is determined that the Habilitation Supervisors are not supervisors within the meaning of §1302, of the Act, they are inappropriate for inclusion in the existing bargaining unit of nurses.

A hearing was held on August 24, 1995, September 12, 1995, September 18, 1995, and February 21, 1996. Thereafter, the parties presented closing argument in the form of simultaneous post-hearing submissions with the final submission being received on March 18, 1996. The following decision results from the record thus compiled.

ISSUES

1. Whether the Habilitation Supervisors are excluded from coverage under the Act because they are "supervisors" within the meaning of 19 Del.C. §1302(p)?
2. If not, whether the classification of Habilitation Supervisor is appropriate for inclusion in the same bargaining unit as the professional staff employed in the classifications of Nurse I, II and III, Nurse Supervisor, CMRP Nurse and CMRP Nurse Supervisor?¹

PRINCIPAL POSITIONS OF THE PARTIES

Issue No. 1: The State argues that the statute does not require supervisors to exercise absolute authority, only that they possess the authority to effectively recommend action in the areas enumerated in §1302(p), of the

¹ At the start of the hearing, AFSCME expressed its desire to represent the Habilitation Supervisors in a stand-alone unit if they are found to be eligible for coverage under the Act but inappropriate for inclusion in the existing unit of nurses.

Act. The State contends that although the Habilitation Supervisors do not have absolute authority to hire, transfer, layoff, recall, promote, discharge, assign, reward, discipline or adjust grievances they do, in fact, possess the authority to effectively recommend such action.

AFSCME, on the other hand, maintains that the job description of the Habilitation Supervisor classification makes no reference to supervisory responsibilities. The testimony of the Habilitation Supervisors testifying at the hearing further supports the conclusion that the Habilitation Supervisors have no authority to initiate any meaningful action on their own and the supervisory duties they perform, if any, involve routine, clerical or perfunctory tasks.

AFSCME contends that as much as 40% of the work performed by the Habilitation Supervisors involves providing direct care services to the residents of the Stockley Center. AFSCME maintains that the Habilitation Supervisors are, at most, working leaders.

Issue No. 2: The State maintains that the classifications of Nurse I, II and III, Nurse Supervisor, CMRP Nurse and CMRP Nurse Supervisor do not share a community of interest with the classification of Habilitation Supervisor. Most importantly, the State argues that while the duties and skills of the professional staff focus upon the programmatic and clinical aspect of the client's medical needs, the Habilitation Supervisors' duties focus upon operational needs.

As further evidence of the difference between the nurses and the Habilitation Supervisors, the State points out that the Registered Nurses are classified in the Health Group under the Professional Nursing and Therapy Series while the Habilitation Supervisors are classified in the Domestic and Food Services Group under the Sub-Professional Nursing and Therapy Series.

While Registered Nurses are required to possess a minimum of a Bachelor of Science degree in nursing, no professional license or degree from an institution of higher learning is required of the Habilitation Supervisor classification.

The State argues that rather than the bargaining unit of Registered Nurses, the appropriate bargaining unit for the Habilitation Supervisors would be the existing bargaining unit of Habilitation Facilitators represented by the Laborer's International Union of North America, AFL-CIO, Local 1029.

AFSCME argues that the authorization cards submitted pursuant to §1311(a) of the Act, express the desire of at least 30% of the Habilitation Supervisors to be represented by AFSCME, for the purposes of collective bargaining. In the absence of a sufficient number of valid cards supporting another labor organization, the existence of a bargaining unit of the Respondent's employees which is represented by another labor organization is immaterial and has no bearing upon the resolution of this matter.

AFSCME further argues that the Habilitation Supervisors and the nurses work in the same facility, have the same working conditions, are subject to the same supervision and administration and work with the same client population. Considering these similarities and the relatively limited number of Habilitation Supervisors (36), failure to certify them as appropriate for inclusion in the existing bargaining unit of Registered Nurses would result in the unnecessary overfragmentation of bargaining units.

OPINION

Issue No. 1: §1302(m), of the Act provides, in relevant part:

"Public employee" or "employee" means any employee of a public employer except:

(7) Supervisory employees of the public employer, provided however, that any supervisory position in a bargaining unit deemed to be appropriate prior to September 23, 1994 shall so continue, unless said unit is decertified in accordance with Section 1311(b) of this title, or is modified in accordance with procedures authorized by Section 1310(e) of this title.

Section 1302(p), of the Act provides:

"Supervisory employee" means any employee of a public employer who has authority, in the interest of the public employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such actions, if the exercise of such authority is not a merely routine or clerical nature, but requires the use of independent judgment.

Section 1310(d) of the Act provides, in relevant part:

...The Board or its designee shall exclude supervisory employees from all appropriate units created subsequent to September 23, 1994.

The section of the Habilitation Supervisor Position Description entitled

Principal Accountabilities, provides:

1. Plans, assigns, reviews and evaluates the work of cottage staff; schedules shift assignments to ensure sufficient coverage and efficient unit operations; provides staff training and administers discipline and recommendations for corrective action.
2. Monitors the implementation of all designated individual client program plans to ensure active treatment is provided by reviewing daily documentation and monthly reports completed by program staff; Meets with Unit Manager to discuss changes needed in client training.
3. Oversees the physical operation of the unit by requisitioning, grooming, warehouse and reinforcement supplies and conducting inspections to ensure unit is sanitary at all times, living areas are tastefully and appropriately decorated and in compliance with Medicaid standards; Completes and follows up on maintenance orders to ensure that repairs are completed in a timely manner; Ensures clients have adequate and appropriate clothing and personal articles.

4. Implements client training programs and records appropriate data; Plans and participates in special client activities, trips and reinforcement sessions.
5. Prepares and maintains reports and records of unit and client activities.
6. Investigates and documents unusual incidents in the unit and reports findings to Unit Manager.
7. Performs related work as required.

Of the six (6) witnesses testifying for the Union, five (5) are Habilitation Supervisors. The sixth, Carla Cannon, is a Habilitation Training Aide, reporting to a Habilitation Supervisor. Ms. Cannon testified that Habilitation Supervisors often perform the same direct care services as do the Habilitation Facilitators. She also testified concerning her perception that Habilitation Supervisors have no authority to make decisions on their own. Since neither subject is in issue, her testimony was accorded no weight in this decision.

The record contains a significant amount of conflicting testimony and multiple exhibits intended to establish the percentage of time the Habilitation Supervisors provide direct care services to the residents of the Center. Habilitation Supervisors provide direct care under the following circumstances:

1. On a periodic or incidental basis during their assigned shift, as circumstances require. They also routinely assist in serving meals.
2. When the number of Habilitation Facilitators who provide direct care falls below the required minimum, usually caused by absenteeism, the Habilitation Supervisor is required to fill in and provide direct care as a Habilitation Facilitator.

3. When the Habilitation Supervisor volunteers to work overtime hours beyond his regularly scheduled shift as a Habilitation Facilitator.

The hours a Habilitation Supervisor performs the work of a Habilitation Facilitator while on voluntary overtime, is immaterial to this dispute. To require Habilitation Supervisors to provide incidental support to the direct care providers during the regularly scheduled shift and to assist in serving meals is not unreasonable and was, likewise, not a factor in this decision.

The estimates of the percentage of time the Habilitation Supervisors provide direct care vary from as high as 40% by AFSCME to between 5% and 15%, by the State. Both sides agree that the amount of direct care provided by the Habilitation Supervisor varies from week to week depending upon operational requirements and available staff.

Regardless of the parties' estimates, the statute requires only that a supervisor possess the authority to take certain action or to effectively recommend such action in other than a routine or clerical manner. The statute does not define supervisory status in terms of the amount of time an employee engages in the enumerated activities.

Even accepting AFSCME's estimate of 40%, a significant portion of the work week remains for the performance of the other activities including those upon which the State relies to establish supervisory status.

Consistent with the foregoing discussion, the amount of time which Habilitation Supervisors spend providing direct care was not a factor contributing to this decision. For this reason, the testimony of Ms. Sharon Ayres, Director of Residential Services and Day Programs at the Stockley Center, which primarily concerned the amount of time the Habilitation

Supervisors participate in providing direct care in order to prevent overtime was accorded little weight.

Much emphasis was placed upon the fact that the Habilitation Supervisor conducts the performance appraisal of the Habilitation Facilitators. The performance evaluation, like most other decisions of the Habilitation Supervisor, is subject to the approval of the Residential Manager and the Program Director. More importantly, however, participation in the employee evaluation process is not a criteria enumerated in the statutory definition. For these reasons this fact was accorded little weight in this decision.

The State acknowledges that the Habilitation Supervisors do not possess the authority to act in the specific areas set forth in §1302(p) of the Act. Rather, it relies upon their alleged authority to effectively recommend such actions. The authority to effectively recommend such action does not automatically confer supervisory status, however, since the statute also requires that the exercise of such authority not be merely routine or clerical in nature.

The record establishes that the Habilitation Supervisors do periodically offer their thoughts and recommendations on a variety of issues. Less certain is the impact of those recommendations. Insofar as the statutory criteria are concerned, the record is void of any meaningful documentation confirming their involvement or participation in the decision-making process concerning transfer, layoff, recall, and/or promotion. To the contrary, the Habilitation Supervisors testifying on behalf of AFSCME deny involvement in these areas.

Nor is there credible evidence that the Habilitation Supervisors direct other employees in any significant sense. It is undisputed that the Resident Manager or the Program Director is responsible for the shift assignments of

the Habilitation Facilitators. Until recently, the Habilitation Supervisors distributed work assignments among the Habilitation Facilitators assigned to their respective shifts. They no longer assign work since management has delegated to the Habilitation Facilitators the authority and responsibility to distribute the work among themselves.

The testimony of the Habilitation Supervisors establishes that although some participate in the pre-employment process as a member of an employment panel, they do not do so on a regular basis. Peggy Vann testified that she has attended pre-employment interviews and offered recommendations. Darren Sheppard testified that he has also periodically attended pre-employment interviews, the most recent being approximately three (3) years ago when he substituted for his immediate supervisor who was unable to attend. Jennifer Chapman also testified that she has been part of an employment panel interviewing applicants as a replacement for her supervisor who was unable to attend. Walter Smith and Donna Locklear testified they do not participate in the selection process.

In the areas of suspension, discipline, discharge and the rewarding of employees, Darren Sheppard testified that he initiates discipline only at the suggestion of his immediate supervisor. Walter Smith has not been involved in a disciplinary situation during his ten (10) months in the position of Habilitation Supervisor. Because Donna Locklear works on the 10:00 p.m. to 6:00 a.m. shift and has no one reporting to her, she has not been involved in the discipline process. Ms. Locklear did testify that she is responsible for observing each of the seventeen (17) cottages during the night shift and completing observation sheets. When she included comments concerning her observations she was advised not to comment upon but merely record what she observed for review by her superior. None of the Habilitation Supervisors

participate in the grievance procedure other than as a witness, when necessary.

The Habilitation Supervisors each testified that although they do verbally compliment Habilitation Facilitators they are not permitted to issue a written commendation without obtaining prior approval from or being directed by their immediate supervisor.

The Habilitation Supervisors testified that it is not uncommon for Habilitation Facilitators to directly contact the Residential Manager or the Program Director concerning such routine matters such as the scheduling of vacation time. Not only are the Habilitation Supervisors not involved, at times they are not advised by their supervisor of the decisions or action taken but hear first from the Habilitation Facilitators.

The collective testimony of the Habilitation Supervisors establishes their responsibility for scheduling building maintenance and ordering supplies. They also monitor attendance and arrange staff coverage, when necessary, and provide on-site orientation for new employees in the Habilitation Facilitator classification.

The State offered little, if any, direct evidence to rebut the specific testimony from the Habilitation Supervisors. Charlotte Brown, Assistant Director of Residential Services, who assisted in developing the position description for the Habilitation Supervisor was one of two (2) witnesses appearing on behalf of the State. Ms. Brown has held her current position for approximately nine (9) years and currently supervises six (6) Program Directors who supervise the Resident Managers to whom the Habilitation Supervisors report. Prior to her current position, Ms. Brown served as a Program Director.

Ms. Brown testified that the intent when creating the Habilitation Supervisor classification was to create a "shift foreman" responsible for the day-to-day operation in each individual living unit. She characterized the Habilitation Supervisor as a type of assistant to the Residential Manager who "checks things" for them and "acts as their eyes and ears." Ms. Brown summarized the responsibilities of the Habilitation Supervisor as maintaining training and discipline records, monitoring and coaching the direct care staff, administering competency tests, serving as role models, ordering supplies and arranging for building maintenance.

The cumulative evidence documents that the Habilitation Supervisors are involved in a significant amount of record-keeping and/or ministerial activity.

Ms. Brown also testified that she believed the factors upon which the Habilitation Supervisors are evaluated by the Residential Managers would reflect their supervisory status. Ms. Brown acknowledged, however, that she does not regularly review the evaluations of Habilitation Supervisors and did not identify any specific factors. Nor was any documentary evidence offered to corroborate her belief concerning the relevant evaluation factors.

Ms. Brown also testified concerning the educational opportunities available to the staff at the Stockley Center. While Habilitation Supervisors participate in courses concerning subjects related to supervisory and/or management responsibilities, it is their actual day-to-day activity rather than educational exposure that establishes their supervisor status.

Credibility issues necessarily arise whenever there is conflicting testimony. There is no reason to doubt that the various witnesses testified truthfully and to the best of their ability based upon their knowledge of the relevant issue. However, the testimony from the Habilitation Supervisors

results from their daily hands-on involvement in the operation of the individual living units while Ms. Brown is three (3) management levels removed from the direct care function.

Although Residential Managers, to whom the Habilitation Supervisors report, are responsible for the operation of each living unit and are physically located in the same building as the Habilitation Supervisors for whom they are responsible, none testified either directly or as a rebuttal witness to contradict the testimony of the Habilitation Supervisors concerning the frequency or nature of their responsibilities.

The record reflects they are, at best, working leaders who on occasion interact directly with management. Absent, however, "is the essential authority which is the foundation of supervisory status. In order to qualify as a bona fide supervisor under the statutory definition, one must possess consequential responsibility and exercise consequential authority over subordinate employees." In Re: Caesar Rodney Instructional Aides (Del. PERB, Rep. Pet. No. 92-03-070 (1991), Aff'd. Del. PERB (1992)).

Issue No. 2: Section 1310(e) of the Act provides, in relevant part: In making its determination as to the appropriate bargaining unit, the Board or its designee shall consider community of interests including such factors as the similarity of duties, skills and working conditions of the employees involved; the history and extent of employee organization; the recommendations of the parties involved; the effect of overfragmentation of bargaining units on the efficient administration of government; and such other factors as the Board may deem appropriate.

The primary issue addressed by the parties both during the hearing and in the presentation of closing argument concerned the issue of eligibility, i.e., whether or not the Habilitation Supervisors qualified for the supervisory exclusion. The evidentiary record is void of any evidence documenting the primary responsibilities, background or other significant factors involving the Registered Nurses or Nurse Supervisors. For this reason, the Executive

Director, with prior notification to and without objection by the parties, supplemented the record by adding the position descriptions for the classifications of Nurse I, II and III, Nurse Supervisor, CMRP Nurse and CMRP Nurse Supervisor, the classifications which comprise the current bargaining unit.

AFSCME asserts that the Habilitation Supervisors and the various nursing classifications all work at the same facility, are subject to the same supervision and administration and work with the same client population. AFSCME also maintains that given the uniqueness of the Habilitation Supervisor classification, the pay differential between the two (2) groups should not be a distinguishing factor.

The record establishes more differences than similarities between these two (2) groups of employees. The Habilitation Supervisors and the classifications of Nurse I, II and III and Nurse Supervisor are physically located in the same facility. Although the CMRP Nurse has an office on the Stockley campus, she also visits throughout the community. The physical location of the CMRP Nurse Supervisor is unknown.

The Nurse classification reports to a Nurse Supervisor. The Habilitation Supervisor classification reports to a Resident Manager.

AFSCME's reliance upon the "unique nature" of the Habilitation Supervisor is not persuasive. To the contrary, AFSCME argues that the Habilitation Supervisors serve primarily as direct care providers and perform other responsibilities primarily of a clerical and/or routine nature.

The history and extent of organization confirms that the existence of a stand-alone unit of Registered Nurses and Nurse Supervisors of long-standing. The collective bargaining agreement for the existing unit of Registered Nurses and Nurse Supervisors has evolved over an extended period of time

through continuing negotiations which have addressed only the terms and conditions of employment relating directly to the Registered Nurses at the Stockley Center.

The Habilitation Supervisors, on the other hand, have never been organized.

While the recommendations of the parties are valid considerations, it should be noted that AFSCME and not the State (the party responsible and accountable for the operation of the Stockley Center) raises the issue of overfragmentation and its impact upon the efficient operation of government.

The subject of mixing professional and non-professional employees in a single bargaining unit is not a question of first impression before the PERB. In Lake Forest Ed. Ass'n. v. Bd. of Ed., (Del. PERB, Rep. Pet. No. 91-03-060 (1991)), the Association petitioned to combine an existing bargaining unit of secretaries, clerks, custodians and aides with an existing bargaining unit of certificated professional employees. In rejecting the petition, the hearing officer concluded:

Many factors impact the determination of an appropriate bargaining unit and none alone is determinative. Of particular importance when grouping employees together into an appropriate bargaining unit is that they share similar responsibilities, duties and skills. These factors are entitled to even greater weight when the issue involves the intermingling of professional and non-professional employees. It is these considerations which are critically lacking when comparing the professional and classified employees whom the Association seeks to combine into one bargaining unit.

Although the nature of the positions involved in the current matter differ from those at issue in Lake Forest, both cases involve the modification of an long-standing unit of professional employees by adding non-professional employees. Therefore, the underlying rationale of the Lake Forest decision (Supra.) applies.

While the daily responsibilities of the Habilitation Supervisors and the Registered Nurses compliment each other, a review of the position descriptions clearly distinguishes the Habilitation Supervisors from the Registered Nurses and Nurse Supervisors insofar as the critical factors of responsibilities, duties and skills. The section of the position descriptions entitled Knowledge, Skills and Abilities reflects a difference in their respective roles which is consistent with the prior education, training and experience required of each group.

No minimum education level is required of the Habilitation Supervisors nor is certification required. The minimum qualifications require only "education, training and/or experience demonstrating capability in each of the following areas:

1. Knowledge of the methods and techniques for implementing training programs.
2. Knowledge of the methods and techniques of supervision.
3. Ability to communicate effectively.

The Nurse I classification must possess or be eligible to hold a valid license to practice as a Registered Nurse in the State of Delaware. In addition to the licensing requirement, the Nurse II and Nurse III classifications require extended periods of nursing experience as a Registered Nurse or a Bachelor of Science Degree in nursing from a State approved college or university. A Nurse III may qualify with a Master's Degree in nursing from a National League of Nursing accredited college or university.

The Nurse Supervisor and the CMRP Nurse Supervisor are required to possess the same academic and licensing requirements as the Nurse III and the CMRP Nurse but must possess a greater number of years of experience.

The difference in pay grade and rate likewise reflects the difference in the level of responsibilities, duties and skills required. The Nursing job grades range from grade 10 to grade 15 with a maximum salary of \$49,660.00. The job grade of the Habilitation Supervisor is grade 8 with a maximum salary of \$30,962.00.

The National Labor Relations Act contains an express prohibition on the inclusion of both professional and non-professional employees in the same bargaining unit absent the prior approval of the professional employees. As a result, the National Labor Relations Board has previously addressed the issue of the appropriateness of Registered Nurses for inclusion in a bargaining unit with other groups of health care employees and has narrowly construed the unique state of the Registered Nurses.

In the case of Mercy Hospitals of Sacramento, Inc., (NLRB, 217 NLRB 767 (1975)), the NLRB held that Registered Nurses are not appropriate for inclusion in a bargaining unit with other professional health care employees. The NLRB concluded that:

Registered Nurses possess, among themselves, interests evidencing a greater degree of separateness than those possessed by most other professional employees in the health care industry. These distinct interests derive not only from the peculiar role and responsibilities of Registered Nurses in the health care industry, but also from an impressive history of exclusive representation and collective bargaining.

As far back as 1954, in Consolidated Vultee Aircraft Corporation, (NLRB, 108 NLRB 34, (1954)), the Board observed:

The Board has consistently recognized that nurses constitute a well-defined professional group whose training, skill and duties differ from those of other employees, and that a unit confined to nurses is appropriate for the purposes of collective bargaining.

Despite the absence of an express provision in the Public Employment Relations Act concerning professional and non-professional employees in the

same bargaining unit, the holding and supporting rationale of the NLRB is persuasive insofar as the issue of appropriateness under §1310(d) of the Act.

DECISION

Issue No. 1: The classification of Habilitation Supervisor does not qualify as a supervisor within the meaning of §1302(p) of the Act, and is, therefore, eligible for coverage under the Act.

Issue No. 2: The classification of Habilitation Supervisor is not appropriate within the meaning of §1310(d) of the Act, for inclusion in the bargaining unit currently comprised of Registered Nurses and Nurse Supervisors.

Considering that a bargaining unit of Habilitation Supervisors is appropriate under the Act, it would be administratively burdensome and serve no purpose to require AFSCME to file a second petition seeking to represent the Habilitation Supervisors in a stand-alone unit. AFSCME indicated this is an acceptable alternative should it be determined that the Habilitation Supervisors are inappropriate for inclusion in the bargaining unit of nurses. Therefore, the bargaining unit is determined to include all Habilitation Supervisors employed by the Department of Health and Social Services at the Stockley Center in Georgetown.

An election is to be scheduled pursuant to 19 Del.C. §1311 for the purpose of determining if and by whom the Habilitation Supervisors wish to be represented for collective bargaining.

/s/Charles D. Long, Jr.
CHARLES D. LONG, JR.
Executive Director
Del. Public Employment Rel. Bd.

/s/Deborah L. Murray-Sheppard
DEBORAH L. MURRAY-SHEPPARD
Principal Assistant
Del. Public Employment Rel. Bd.

DATED: April 17, 1996